Supreme Court, U.S.
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No. 02-___

In The
Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES, CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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66 pp

QUESTIONS PRESENTED

1. If Congress has specifically provided for interest on refunds of taxes, and Congress has also specifically provided for interest on refunds of duties, should interest also be available for refunds of the HMT, which this Court has held to be an unconstitutional "tax or duty" on exports?

2. Does the failure of the government to pay interest on refunds of the unconstitutional Harbor Maintenance Tax ("HMT") violate the Takings Clause of the Constitution?

3. Is the government required by the Export Clause of the Constitution to pay interest on refunds of the HMT the assessment of which this Court previously held violated that constitutional provision?

4. Does the equitable doctrine of restitution require the government to pay interest on refunds of the unconstitutional HMT?

PARTIES TO THE PROCEEDINGS BELOW

The caption identifies the parties to the proceedings below.

RULE 29.6 STATEMENT

Petitioner International Business Machines Corp. has no parent companies, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
RULE 29.6 STATEMENT ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
PETITION FOR A WRIT OF *CERTIORARI* 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS 1
STATEMENT OF THE CASE 1
REASONS FOR GRANTING THE WRIT 5
I. The Court Should Grant the Writ Because of the Importance of This Case 5
II. The Court Should Grant the Writ Because of Serious Flaws in the Reasoning of the Federal Circuit 6
A. If Congress specifically and explicitly provided for interest on refunds of both duties and taxes, then interest must be available for refunds of the HMT, which this Court has held to be unconstitutional as a duty or tax on exports 7

TABLE OF CONTENTS (Continued)

Pages

B. Interest on Refunds of Unconstitutional HMT is Available Under the Takings Clause 11
C. Interest on Refunds of the Unconstitutional HMT is Available Under the Export Clause 13
D. Interest on Refunds of the Unconstitutional HMT is Available Under the Equitable Doctrine of Restitution 14
CONCLUSION 18

TABLE OF AUTHORITIES

CASELAW **Pages**

Brown v. Legal Foundation of Washington, 123 S.Ct. 1406 (2003).....12, 13
Brushaber v. Union P.R. Co., 240 U.S. 1 (1916).....12, 13
Fairbank v. United States, 181 U.S. 283 (1901) 13
Henkels v. Sutherland, 271 U.S. 298 (1926).....13
Ikelionwu v. United States, 150 F.3d 233 (2d Cir. 1998) 16
International Business Machines, Corp. v. U.S., 531 U.S. 1183 (2001) 4
International Business Machines, Corp. v. U.S., 2002 Ct. Intl. Trade LEXIS 16 (Ct. Int'l Trade Feb. 21, 2002).....1
International Business Machines, Corp. v. U.S.,2003 U.S. App. LEXIS 5396 (Fed. Cir. March 19, 2003).....1
Larson v. United States, 274 F.3d 643 (1st Cir. 2001).....16
Library of Congress v. Shaw, 478 U.S. 310 (1986) 6, 8, 11
Magnano Co. v. Hamilton, 292 U.S. 40 (1934) 12
Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998).....11

CASELAW (Continued) **Pages**

Quarty v. United States, 170 F.3d 961 (9th Cir. 1999) 12
United States v. $7,990.00, 170 F.3d 843 (8th Cir. 1999) 16
United States v. $30,006.25, 236 F.3d 610 (10th Cir. 2000) 16, 17
United States v. $277,000, 69 F.3d 1491 (9th Cir. 1995) 16
United States v. $515;060.42, 152 F.3d 491 (6th Cir. 1998) 15
United States v. $133,735.30, 139 F.3d 729 (9th Cir. 1998) 16
United States Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995) 2
United States Shoe Corp. v. United States, 20 C.I.T. 206 (1996) 2, 3
United States Shoe Corp. v. United States, 114 F.3d 1564 (Fed. Cir. 1997) 2
United States Shoe Corp. v. United States, 523 U.S. 360 (1998) 3, 5
United States Shoe Corp. v. United States, 296 F.3rd 1378 (Fed. Cir. 2002) 4
United States Shoe Corp. v. United States, 71 U.S.L.W. 3734 (May 27, 2003) 4, 5

CASELAW (Continued) **Pages**

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980)..... 11

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

U.S. CONST., art. I, sec., 9, cl. 5..... 2, 5
U.S. CONST., amend. 5..... 4
19 U.S.C. § 1505 ..... 3, 7, 8, 10
26 U.S.C. § 4461 2
26 U.S.C. § 4462 ..... 2, 3, 5, 8
26 U.S.C. § 6621 5
26 U.S.C. § 9505 2
26 U.S.C. § 9602(b)..... 2
28 U.S.C. § 1254(1)..... 1
28 U.S.C. § 1295(a)(5)..... 5
28 U.S.C. § 1581 .....5, 10
28 U.S.C. § 2411 .....*passim*
28 U.S.C. § 2465(b)(1)(C)..... 17

MISCELLANEOUS

Dobb's Law of Remedies (1993)..... 14
Restitution and Implied Contracts, 66 Am. Jur. 2d § 1 (1973) 15

MISCELLANEOUS (Continued) **Pages**

RESTATEMENT OF RESTITUTION
§ 156, 157 (1937) 15

PETITION FOR A WRIT OF *CERTIORARI*

Petitioner International Business Machines, Corp. respectfully petitions for a writ of *certiorari* to review the judgment of the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") in this case.

OPINIONS BELOW

The opinion of the Federal Circuit (Pet. App. 1a-8a) is available at 2003 U.S. App. LEXIS 5396 (Fed. Cir. March 19, 2003). The opinion of the U.S. Court of International Trade (Pet. App. 9a-12a) is available at 2002 Ct. Intl. Trade LEXIS 16 (Ct. Int'l Trade Feb. 21, 2002).

JURISDICTION

The Federal Circuit issued its decision on March 19, 2003. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The relevant constitutional, statutory, and regulatory provisions are reproduced in the appendix (at 36a-38a).

STATEMENT OF THE CASE

The issue in this case is whether the government must pay interest or disgorge its profits on the money it exacted unconstitutionally from exporters via the Harbor Maintenance Tax ("HMT"). International Business Machines, Corp. ("IBM") asks this Court to grant its petition for *certiorari*.

1. The HMT required importers, exporters, and domestic shippers to pay the government a percentage of the value of all cargo they moved through any port. 26 U.S.C. §§ 4461-4462. IBM and many thousands of other companies paid the tax, and the government kept the collected monies in the Harbor Maintenance Trust Fund, where those monies earned interest. 26 U.S.C. §§ 9505, 9602(b).

IBM paid the HMT on the goods it exported. IBM, and thousands of other exporters filed suit to recover those funds, claiming that the tax violated the Export Clause, the constitutional provision that states: "No Tax or Duty shall be laid on articles exported from any State." U.S. CONST. art. I, § 9, cl. 5. A special three-judge panel of the Court of International Trade ("CIT") ruled the HMT unconstitutional as a tax or duty on exports. *United States Shoe Corp.* v. *United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995). After the government filed a notice of appeal, the CIT issued a judgment ordering the government to pay interest on refunds of the HMT, which was codified as a "tax" in the Internal Revenue Code. *United States Shoe Corp.* v. *United States*, 20 C.I.T. 206, 208-09 (1996). The court ruled that Congress had waived immunity from interest by enacting 28 U.S.C. § 2411, which provides: "[i]n any judgment of any court rendered . . . for any overpayment in respect of any internal-revenue tax, interest shall be allowed."

On appeal, a special five-judge panel of the Federal Circuit affirmed the ruling of the CIT that the HMT was a "tax or duty" on exports and thus violated the Export Clause. *United States Shoe Corp.* v. *United States*, 114 F.3d 1564, 1577 (1997). The Federal Circuit did not address the question of interest because the government's notice of appeal had pre-

dated the CIT's decision awarding interest. *United States Shoe*, 20 C.I.T. at 207. This Court granted *certiorari* and affirmed unanimously the decision of the Federal Circuit. *United States Shoe Corp. v. United States*, 523 U.S. 360, 370 (1998).

2. After this Court had struck down the HMT as an unconstitutional "tax or duty" on exports, IBM's action was designated by the Court of International Trade as a "test case" on the issue of interest on the refunds of the HMT. On June 17, 1998, the CIT ordered the government to pay interest to IBM. Pet. App. 34-35a. The decision adopted the earlier ruling of the CIT (*United States Shoe*, 20 C.I.T. at 209) that interest was owed pursuant to 28 U.S.C. § 2411.

The government appealed the ruling of the CIT in *IBM*, and the Federal Circuit reversed the CIT. Pet. App. 17a-33a. The court deemed section 2411 inapplicable to the HMT due to a provision of the HMT stating: "The tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes" (26 U.S.C. § 4462(f)(3)). Pet. App. 22a-23a. The Federal Circuit also rejected IBM's argument that interest was owed because: (a) "all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] . . . as if such tax were a customs duty" (26 U.S.C. § 4462(f)(1)); and (b) the administrative provisions of the customs laws provide that "[t]he Customs Service shall . . . refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation" (19 U.S.C. § 1505(b)). Pet. App. 36a. The court ruled that section 1505 "contemplates an entirely different factual scenario from the one before us" be-

cause it contains words such as "liquidation" that apply only to import duties. *Id.* at 32a.

IBM filed a petition for writ of *certiorari*, contending, *inter alia*, that the government's retention of interest violated the Takings Clause of the Fifth Amendment of the U.S. Constitution, which provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST., amend 5. This constitutional contention was presented to this Court for its consideration as an alternative reason to grant review, even though it had not been fully aired before the Federal Circuit. The United States opposed the petition, in part, on the ground that the constitutional contention had not been raised below, U.S. BIO, No. 00-482 at 5, and the petition was denied. 531 U.S. 1183 (2001).

3. After this Court denied IBM's petition, IBM returned to the CIT in order to raise its Fifth Amendment Takings Clause argument for interest in the normal course, as well as to present arguments for interest under the Export Clause and the equitable doctrine of restitution. The CIT, however, declined to consider those arguments on the merits because it believed that only the Federal Circuit could address them at that point, given the procedural posture of the action. Pet. App. 9a. IBM then appealed to the Federal Circuit, which declined to address the procedural issue and instead affirmed on the substantive ground that its decision in *United States Shoe Corp. v. United States*, 296 F.3rd 1378 (2002), had already rejected the availability of interest on the basis of the arguments presented by IBM. Pet. App. 8a.

4. On May 27, 2003, this Court denied United States Shoe Corporation's petition for a writ of *certio-*

rari from the Federal Circuit's decision on the basis of which that circuit also denied IBM relief here. 71 U.S.L.W. 3734 (May 27, 2003). With respect, IBM believes this Court's recent denial of *certiorari* was ill-considered. For the important reasons which follow, IBM urges the Court to grant review here and determine for itself, on the merits, whether interest is available for the unconstitutional exaction that this Court declared to have occurred in its 1998 *United States Shoe* decision concerning the HMT.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant the Writ Because of the Importance of This Case.

This case warrants *certiorari* due to its importance. The government collected nearly $1.5 billion in export taxes notwithstanding the constitutional decree that "[n]o Tax or Duty shall be laid on articles exported from any State." U.S. CONST. art. I, § 9, cl. 5. The government then held that money for more than a decade, depriving the exporters of an estimated $700 million in lost time-value of the money (as calculated by the statutory interest rate for refunds of taxes and customs duties, *see* 26 U.S.C. § 6621) and earning an estimated $70 million in actual proceeds from its ill-gotten money. The claims of approximately 7500 companies for interest will be determined by the outcome of this action. Because lawsuits arising from the HMT are within the exclusive jurisdiction of the Court of International Trade (*see* 26 U.S.C. § 4462(f)(2); 28 U.S.C. § 1581; *United States Shoe*, 523 U.S. at 366), the decisions of which are appealable only to the Federal Circuit (*see* 28 U.S.C. § 1295(a)(5)), a circuit conflict can never arise regarding the statutory basis for interest.

The government itself petitioned successfully for *certiorari* in *United States Shoe* by emphasizing the case's importance. Furthermore, the government has repeatedly sought *certiorari* successfully in cases that involve large sums of money and that arise from subject matter within the exclusive jurisdiction of the Federal Circuit.

II. The Court Should Grant the Writ Because of Serious Flaws in the Reasoning of the Federal Circuit.

Certiorari is also warranted due to the flaws in the reasoning of the Federal Circuit in both IBM's case and that of the United States Shoe Corporation. In these cases, the Federal Circuit relied on the Supreme Court's holding in *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986), that, unless Congress expressly waives the government's sovereign immunity, or the Constitution otherwise provides, the government is not required to pay interest.

In this case, if the lower courts are correct that Congress, although it expressly waived the government's sovereign immunity from interest payments for both tax and duty refunds, did not do so with respect to refunds of the HMT, *Shaw* instructs that the government's obligation to pay interest on the HMT must be found in the Constitution. Even though this Court has never reviewed the merits of whether a statute provides the express waiver of immunity required under *Shaw,* interest on refunds of the unconstitutional HMT is available under the principle enunciated in *Shaw* pursuant to the Constitution itself. Specifically, interest on refunds of the unconstitutional HMT is available under the Takings Clause, or, alternatively, the Export Clause. In any event,

such interest is available under the equitable doctrine of restitution.

A. If Congress specifically and explicitly provided for interest on refunds of both duties and taxes, then interest must be available for refunds of the HMT, which this Court has held to be unconstitutional as a duty or tax on exports.

Congress waived immunity from interest on both customs duties — "[t]he Customs Service shall . . . refund any excess moneys deposited, together with interest thereon" (19 U.S.C. § 1505) — and taxes — "[i]n any judgment of any court rendered . . . for any overpayment in respect of any internal-revenue tax, interest shall be allowed" (28 U.S.C. § 2411). This Court has held, in *United States Shoe*, that the HMT is unconstitutional because it is a "tax or duty" on exports, and thus violates the Export Clause.

In IBM's initial appeal, the Federal Circuit held that, although Congress provided specifically, in 19 U.S.C. § 1505, for interest on refunds of duties, and specifically, in 28 U.S.C. § 2411, for interest on refunds of taxes, the government has no obligation whatsoever to pay interest on the HMT, which this Court held to be an unconstitutional "tax or duty" on exports. Such a result flies in the face of the intention of the framers of the Constitution that no burden should be placed on exports. In its decision on IBM's original appeal, however, the Federal Circuit merely addressed whether Congress, by statute, had waived the immunity of the government from the obligation to pay interest. The Federal Circuit did not address

the other basis discussed in *Shaw* for overcoming the government's immunity, that is, the Constitution.

After this Court denied IBM's first petition for writ of *certiorari*, and declined to address the Federal Circuit's decision to deny interest based on the lack of an explicit statutory waiver of immunity, IBM returned to the CIT. There, IBM argued that interest on refunds of the HMT should be available under the Takings Clause, the Export Clause, and the equitable doctrine of restitution. After the CIT refused to address those arguments, for procedural reasons, IBM appealed the CIT's decision to the Federal Circuit. The resulting decision of the Federal Circuit is the subject of the instant petition, which asks this Court to correct the absurd result of the lower courts' reasoning that one will receive interest on refunds of duties or taxes in the usual course, but not on a refund of an unconstitutional tax or duty.

First, the Federal Circuit held that interest is not available under the tax interest statute, 28 U.S.C. § 2411, because, in the HMT statute, at 26 U.S.C. § 4462(f)(3), Congress instructed that the HMT was not to be "treated as a tax for purposes of . . . any . . . provision of law relating to the administration and enforcement of internal revenue taxes." Then, the Federal Circuit held that interest is not available under the duty interest statute, 19 U.S.C. § 1505, even though the HMT statute, at 26 U.S.C. § 4462(f)(1), provides that "all administrative and enforcement provisions of customs laws and regulations shall apply [to the HMT] as if such tax were a customs duty." The quoted statutes clearly do not exhibit an intention of Congress to deprive taxpayers of interest on their refunds of the unconstitutional HMT. What these statutes do is establish Congress' intent that,

for purposes of "administration and enforcement," the HMT, although it is a tax codified in the Internal Revenue Code, be treated "as if" it were a customs duty.

The Internal Revenue Service administers and enforces internal revenue taxes, and the Bureau of Customs and Border Protection (formerly the U.S. Customs Service) ("Customs") administers and enforces customs duties. In enacting the provisions of the HMT statute quoted above, Congress was merely clarifying which of these two administrative agencies would administer and enforce the HMT. The choice of Customs seems appropriate in view of the fact that the HMT was assessed on goods imported into, and exported from, the United States, activities within the usual domain of Customs' administration and enforcement responsibilities.

Contrary to the Federal Circuit's holding, the provisions of the HMT statute quoted above have absolutely no effect on the judicial award of interest under 28 U.S.C. § 2411. In no way is a court's award of interest under a statute enacted in the Judicial Code (Title 28, not Title 26 (Internal Revenue Code)) affected by Congress' designation of the HMT as a "customs duty" for purposes of "administration and enforcement." The courts are not administering or enforcing the HMT when they award interest to a taxpayer on its refund of an unconstitutionally exacted tax. The court is ordering the administrative agency to pay interest, in accordance with the Judicial Code, on a tax refund.

Furthermore, the Federal Circuit also misinterpreted the provisions of the HMT statute quoted above when the court held that customs duty interest

is not available because 19 U.S.C. § 1505 uses language, such as the word "liquidation," that only applies to imports. It is certainly not a great surprise that the language of the statute providing for interest on refunds of customs duties uses language that applies to imports, and not exports, because the framers of the Constitution, in the Export Clause, flatly prohibited customs duties on exports. Recognizing this fact, this Court, in *United States Shoe*, specifically read the language of the jurisdictional provision, 28 U.S.C. § 1581(i), that refers only to imports, and not to exports, to apply to the HMT on exports. In reaching its erroneous conclusion regarding the inapplicability of the customs duty interest provision, the Federal Circuit completely ignored this holding of this Court in *United States Shoe*. For this reason alone, this Court should grant this petition for writ of *certiorari*.

The provisions of the HMT statute quoted above should be interpreted in a light favorable to IBM, because to interpret them otherwise raises serious constitutional questions about the legitimacy of the government's actions with respect to HMT interest. If this Court accepts the lower court's interpretation of the statutes, the Court should correct the illogical and unjust result of that interpretation by granting this petition and providing IBM interest under the Takings Clause or the Export Clause of the Constitution, or, in any event, under the equitable doctrine of restitution.

B. Interest on Refunds of Unconstitutional HMT is Available Under the Takings Clause.

This Court, in *Shaw*, specifically recognized the Takings Clause of the Fifth Amendment as creating an exception to the government's immunity from having to pay interest. *See Shaw*, 478 U.S. at 317, n. 5. Furthermore, the Takings Clause requires the government to pay, as part of the "just compensation," required by the Fifth Amendment, interest based on the lost time-value of the money.

First, the retention of interest earned by the government on unconstitutional HMT taxes qualifies as a *per se* taking because the government held the monies in the Harbor Maintenance Trust Fund for its own use. The Court has held that the retention of interest is a *per se* taking in other cases with takings similar to that at issue in this case. *See Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

Second, IBM is entitled to the lost time-value of its unconstitutionally exacted HMT because the very exaction of the tax was confiscatory and thereby effected a taking under *Brushaber v. Union P.R. Co.*, 240 U.S. 1 (1916) and its progeny. *Brushaber* discussed the possibility of a situation

> where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking

> of the same in violation of the 5th Amendment . . . .

Id. at 24-25. The circumstance of a tax giving rise to a taking was further fleshed out in *Magnano Co. v. Hamilton*, 292 U.S. 40 (1934), which explained that such a situation arises when "the form of taxation was adopted as a mere disguise, *under which there was exercised, in reality, another and different power denied by the Federal Constitution . . . .*" *Id.* at 45 (emphasis added). This rule of law remains vital. *See, e.g., Quarty v. United States*, 170 F.3d 961, 969 (9th Cir. 1999) ("Levying of taxes does not constitute a Fifth Amendment taking unless the taxation is 'so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property . . . .'") (quoting *Brushaber* at 24). It has straightforward application to the instant situation, where Congress taxed exports in violation of the Constitution's single express prohibition on its taxing power. Accordingly, Congress' taxation of exports in this case was an exertion of a power forbidden to it under the Constitution, and, under controlling authority, this unconstitutional exaction gave rise to a confiscatory tax which requires interest to be paid as a component of just compensation.

Whether the taking arose from the retention of the interest or from the outright exaction of the tax, the measure of the plaintiff's recovery is not the actual proceeds of the retained export taxes, but rather the time-value of the money from the taxpayer's perspective: "[C]onsistent and unambiguous holdings [from this Court]" support the conclusion that "the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain." *Brown v. Legal Foundation*

of Washington, 123 S.Ct. 1406, 1419 (2003). At a minimum, the retention by the government of $70 million in actual proceeds must be disgorged under the rule set forth by this Court in *Henkels* v. *Sutherland*, 271 U.S. 298 (1926) — *viz.*, that retention of actual proceeds is not shielded by governmental immunity from interest.

C. Interest on Refunds of the Unconstitutional HMT is Available Under the Export Clause.

This Court has addressed the broad reach of the Export Clause. Specifically, this Court held that the "restriction on the power of Congress . . . should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed." *Fairbank v. United States*, 181 U.S. 283, 290 (1901).

The Export Clause's categorical text, "[n]o Tax or Duty shall be laid on articles exported from any State," reflects the framers' purposes to ensure (1) "that exports should not be made a source of revenue to the national government," and (2) "that the national government should put nothing in the way of burden upon such exports." *Fairbank*, 181 U.S. at 292-93. A refund of export tax principal without interest runs contrary to both of these purposes of the Export Clause recognized in *Fairbank*, and thus violates the letter and spirit of the Export Clause.

The Court's unanimous decision in *United States Shoe* that the tax violated the Export Clause was grounded in this Court's underlying determination that the Export Clause is a broad, explicit, direct and complete prohibition of any tax or duty on exports.

To make a taxpayer whole for the unconstitutional deprivation of its money, the Export Clause requires not only a refund of the principal amount of export taxes, but a refund of concomitant interest calculated on the basis of the lost time-value of the money. If interest were denied on refunds of export taxes, Congress could deliberately enact laws that violate the Export Clause and retain the interest that it earned on the illegal exaction, thereby depriving taxpayers of interest on sums that should never have been taxed in the first place. In the present case, if the Court does not grant this petition, the government will have had the free use of unconstitutionally exacted funds for up to sixteen years in some instances. This result would be a clear subversion of the letter and spirit of the Export Clause, as the government will have succeeded in burdening exports and generating revenue therefrom.

D. Interest on Refunds of the Unconstitutional HMT is Available Under the Equitable Doctrine of Restitution.

In any event, the Court should grant the petition to address whether, under the equitable doctrine of restitution, the government should be required to disgorge the interest that it actually earned on the unconstitutional HMT. Under the traditional application of the equitable doctrine of restitution, where property is unlawfully obtained by compulsion or coercion, it must be returned to its rightful owner to prevent un-just enrichment. *See generally Dobb's Law of Remedies*, 628-55 (1993). Traditionally, restitution has included "not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or repa-

ration of benefits derived from, or the loss or injury caused to another." 66 Am. Jur. 2d § 1 *RESTITUTION AND IMPLIED CONTRACTS* (1973) at 942. The measure of what must be returned, in this case, is based on the government's gain, not the taxpayers' losses. Thus, courts have required the person obligated to make restitution "to account for the direct product of the subject matter received while in his possession, and to pay such additional amount as compensation for the use of the subject matter as will be just to both parties . . . even though the transferred property itself has previously been recovered, and an action is brought solely to recover the income or value of the use of the subject matter, or interest upon the amounts of its value." *Id.* § 171 at 1098 citing *RESTATEMENT OF RESTITUTION* § 157 (1937). Moreover, "a person who has a duty to pay the value of a benefit which he has received is also under a duty to pay interest upon such value from the time he committed the breach of duty in failing to make restitution if, and only if, the benefit constituted of a definite sum of money . . . or the payment of interest is required to avoid injustice." *Id.* citing *RESTATEMENT OF RESTITUTION* §§ 156, 157 (1937).

The equitable doctrine of restitution applies in the present situation in spite of the rule in *Shaw*. Two circuits have found the rule in *Shaw* to be inapplicable where the government earned interest, actually or constructively, on unlawfully obtained money. *See, e.g., United States v. $515,060.42*, 152 F.3d 491, 504-05 (6th Cir. 1998) ("While sovereign immunity customarily precludes the Government's liability for interest prior to judgment . . . to the extent that the Government has actually or constructively earned in-

terest on seized funds, it must disgorge those earnings along with the property . . . there is no issue of sovereign immunity because the Government is not being asked to pay interest, but to disgorge property."). *United States v. $133,735.30*, 139 F.3d 729, 732-33 (9th Cir. 1998) (acknowledging that the Government is not generally liable for damages or interest prior to judgment be-cause of sovereign immunity, but noting that the court was "offended by the notion that the Government could profit from [the] use of a claimant's property by (actually or constructively) earning interest on money," and so upheld an award of interest where the "Government benefited from the use of [plain-tiff's] money . . . [W]hen seized currency is deposited in an interest-bearing Treasury account, the Government must only return with the *res* the interest earned by the Fund at the prevailing rate."). *See also United States v. $277,000*, 69 F.3d 1491 (9th Cir. 1995).

The United States Courts of Appeal for the First, Second, Eighth and Tenth Circuits, however, have declined to recognize an equitable exception to the Shaw rule in cases with factual bases similar to those considered by the Sixth and Ninth Circuits. *See, e.g., Larson v. United States*, 274 F.3d 643 (1st Cir. 2001); *United States v. $30,006.25*, 236 F.3d 610, 614-15 (10th Cir. 2000); *United States v. $7,990.00*, 170 F.3d 843, 845-46 (8th Cir. 1999); *Ikelionwu v. United States*, 150 F.3d 233, 238-39 (2d Cir. 1998).

IBM's situation here presents the same issue as the one causing the split, even though it is not a forfeiture action. Like the forfeiture cases, the instant action involves a benefit that the United States has actually and calculably received from IBM's unconstitutionally collected money. Both situations involve

unlawful (and, in IBM's case, unconstitutional) confiscations of money by the Government.

Because the circuits' reasoning applies to unlawful confiscations generally, IBM likely would have been entitled to interest in the Sixth and Ninth Circuits, but would not have received interest in the First, Second, Eighth, and Tenth Circuits, even after the enactment of the new forfeiture statute by Congress. *See $30,000.25*, 236 F.3d at 613 (referencing the Civil Asset Forfeiture Reform Act of 2000, codified at 28 U.S.C. § 2465(b)(1)(C)). That statute does not resolve the circuit split as it relates to IBM.

Outside of forfeiture actions, the circuit split will continue whenever the Government unlawfully collects money from private citizens. At a minimum, therefore, the Court should grant the petition for the purpose of resolving this conflict among the circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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International Business
Machines, Corp.

June 17, 2003

INTERNATIONAL BUSINESS MACHINES CORPORATION, Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

02-1356

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2003 U.S. App. LEXIS 5396

March 19, 2003, Decided

NOTICE:
THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

PRIOR HISTORY:

IBM v. United States, 2002 Ct. Intl. Trade LEXIS 16 (Feb. 21, 2002)

DISPOSITION:
Affirmed.

JUDGES:
Before NEWMAN, SCHALL, and DYK, Circuit Judges.

OPINION BY:
DYK

OPINION:
DYK, Circuit Judge.

International Business Machines ("IBM") appeals the Court of International Trade's decision holding that it is not entitled to interest on the Harbor Maintenance Tax on exports ("HMT") it paid. *Int'l Bus. Machs. Corp. v. United States*, 2002 Ct. Intl. Trade LEXIS 16, No. 94-10-00625, slip op. at 3 (Ct. It'l Trade Feb. 21, 2002) ("Final Order"). We affirm.

I

On October 24, 1994, IBM filed a complaint in the Court of International Trade for a refund of the HMT it had paid up to that point. Another HMT payer, United States Shoe Corporation, filed a substantively identical complaint in the Court of International Trade on November 23, 1994, and its suit was designated as a test case,

while other suits, including IBM's, were stayed. The Court of International Trade held that the HMT violated the *Export Clause* and awarded interest on the judgment. *United States Shoe Corp. v. United States*, 924 F. Supp. 1191, 19 Ct. Int'l Trade 1413 (1995). The government appealed to this court solely on the constitutionality of the HMT, not on the entitlement to interest. This court affirmed. *United States Shoe Corp. v. United States*, 114 F.3d 1564, 1577 (Fed. Cir. 1997). The Supreme Court subsequently agreed that the HMT violated the Export Clause. *United States v. United States Shoe Corp.*, 523 U.S. 360, 370, 140 L. Ed. 2d 453, 118 S. Ct. 1290 (1998).

The government then sought a test case for the Court of International Trade to determine whether interest was due on such judgment for refund of the HMT. IBM's suit was chosen. The Court of International Trade held IBM was entitled to recover interest on the refund of the HMT pursuant to a tax statute, 28 U.S.C. § 2411. *IBM v. United States*, 22 Ct. Int'l Trade 519 (1998). The court did not specifically address whether IBM was entitled to interest pursuant to the Takings Clause of the Fifth Amendment or under equitable restitution. The government appealed to this court, and we reversed, holding that 28 U.S.C. § 2411 was not applicable because the HMT was an excise duty rather than a tax. *Int'l Bus. Machs. Corp. v. United States*, 201 F.3d 1367, 1374 (Fed. Cir. 2000). At the end

of the opinion, the ordering clause stated that "the judgment of the Court of International Trade must be, and is, REVERSED." *Id.* IBM petitioned for panel rehearing and rehearing en banc, inter alia, on the ground that IBM was entitled to interest under the *Takings Clause of the Fifth Amendment.* The petition was denied on May 31, 2000. *IBM v. United States*, 2000 U.S. App. LEXIS 15299, No. 98-1590 (Fed. Cir. May 31, 2000) (Order denying rehearing and rehearing en banc).

On June 6, 2000, IBM moved to amend the opinion and judgment (1) to state that this court had not reversed the portion of the Court of International Trade's judgment awarding the refund of the HMT, only the portion awarding interest on the refund, and (2) to vacate and remand the case to the Court of International Trade. On June 9, 2000, the panel issued an Errata Sheet which contained the following amendment of its judgment:

At page 14, under CONCLUSION, replace "The judgment of the Court of International Trade" with -- The portion of the judgment of the Court of International Trade ordering interest pursuant to 28 U.S.C. § 2411 as owing on the principal amount adjudged --.

On June 12, 2000, we denied IBM's motion to amend the opinion and judgment. The Supreme

Court denied certiorari. *IBM v. United States*, 531 U.S. 1183 (2001).

IBM returned to the Court of International Trade, asserting a claim to interest under the *Takings Clause* or equitable restitution and moving for summary judgment on its interest claim. The Court of International Trade denied the motion, stating: "The Court of Appeals did not remand this matter for the court to consider constitutional issues after plaintiff's [sic] sought reconsideration in the appellate court on such grounds. The appellate court simply reversed the interest award aspect of the judgment." Final Order 2002 Ct. Intl. Trade LEXIS 16, [slip op.] at 2. "It is up to [the Court of Appeals] to recall the mandate in this matter, if possible. This court may not amend the judgment of the appellate court." 2002 Ct. Intl. Trade LEXIS 16, [slip op.] at 3.

IBM timely appealed to this court. After both IBM and the government had filed their initial briefs, we decided two cases involving HMT payers' entitlement to interest: *United States Shoe Corp. v. United States*, 296 F.3d 1378 (Fed. Cir. 2002); and *Hohenberg Bros. Co., A.C. v. United States*, 301 F.3d 1299 (Fed. Cir. 2002). United States Shoe held that the HMT was not a taking, so that interest was not due, 296 F.3d at 1383, and that the equitable doctrine of restitution did not apply, *id.* at 1386. Hohenberg applied the rule from United States Shoe and

denied interest to other HMT payers. 301 F.3d at 1306.

In its reply brief in this case, IBM acknowledged that these cases made "IBM's initial request for further proceedings before the [Court of International Trade] ... moot" because "the panel considering the instant appeal will be obligated to follow the ... decisions to deny IBM's constitutional and equitable claims for interest." (Appellant's Reply Br. at 4.) It thus asked only that we "vacate the [Court of International Trade]'s Final Order in this case" to clear the way for its petition for certiorari. Id.

We then asked the parties for additional submissions. Letter to Counsel dated Jan. 24, 2003. We noted that "this case appears to be resolved by" United States Shoe and Hohenberg, as well as *Arbon Steel Serv. Co., Inc. v. United* States, 315 F.3d 1332 (Fed. Cir. 2003), which also applied the rule from United States Shoe, *id.* at 1334-35, so that "the court need not reach the question whether consideration of the merits is foreclosed by this court's earlier decision." *Id.* We therefore asked the parties to provide additional submissions addressing "whether there are any issues in this case that are not resolved by the aforementioned decisions." Id. In its response, IBM admitted that "the panel will be bound to the substantive precedent established in United States Shoe Corp." Letter from Counsel dated Jan. 29, 2003. However, IBM continued to urge that we "vacate the February

21, 2002, order of the United States Court of International Trade" so that "the record will be absolutely clear that there are no impediments to IBM's filing of a petition for a writ of certiorari." Id. at 1-2. In its response, the government also "agreed that these decisions foreclose consideration of the substantive issues raised in this appeal." Letter from Dep't of Justice dated Jan. 29, 2003. However, the government opposed vacating the Court of International Trade's judgment because the Court of International Trade "committed [no] procedural error." Id. at 2.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(5).

II

Both parties agree that our decisions in United States Shoe, Hohenberg, and Arbon Steel resolve the underlying issues adversely to IBM, although the plaintiffs in United States Shoe and Hohenberg have petitioned for certiorari to the Supreme Court. Hohenberg, petition for cert. filed, (U.S. Feb 27, 2003) (No. 02-1286); United States Shoe, petition for cert. filed, 71 U.S.L.W. 3567 (U.S. Feb 19, 2003) (No. 02-1221). IBM nonetheless urges us to decide a procedural issue: whether this court's mandate in *International Business Machines Corp. v. United States*, 201 F.3d 1367 (Fed. Cir. 2000), foreclosed consideration of the merits of IBM's

constitutional and equitable claims, as the Court of International Trade held here.

We decline IBM's invitation to issue an advisory opinion on this question.[1] We are bound by our earlier decisions holding that there is no constitutional or equitable entitlement to interest on HMT payments. Therefore, we need not and do not decide whether the constitutional and equitable theories of recovery were open on the remand.

III

For the foregoing reasons, we affirm.

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1 Determination of the scope of our mandate is not a jurisdictional issue. As we noted in *Exxon Chemical Patents v. Lubrizol Corp.*, 137 F.3d 1475 (Fed. Cir. 1998), "every appellate court judgment vests jurisdiction in the district court to carry out some further proceedings." *Id.* at 1483.

INTERNATIONAL BUSINESS MACHINES, CORP.,
Plaintiff,
v.
UNITED STATES,
Defendant.

Court No. 94-10-00625

UNITED STATES COURT OF INTERNATIONAL TRADE

2002 Ct. Intl. Trade LEXIS 16; SLIP OP. 2002-17

February 21, 2002, Dated

PRIOR HISTORY:
IBM v. United States, 201 F.3d 1367, 2000 U.S. App. LEXIS 681 (Fed. Cir., 2000)

DISPOSITION:
Plaintiff's motion to lift stay and enter judgment granted in part. Plaintiff's motion for summary judgment for award of interest denied and matter terminated.

COUNSEL:

Baker & McKenzie (Susan G. Braden, William D. Outman, II, Kevin M. O'Brien, Teresa A. Gleason and Michael E. Murphy) for plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General, David M. Cohen, Director, Jeanne E. Davidson, Deputy Director, Todd M. Hughes, Assistant Director, Jeffrey A. Belkin, Trial Attorney, Commercial Litigation Branch, Civil Division United States Department of Justice, for defendant.

JUDGES:
HONORABLE JANE A. RESTANI, JUDGE.

OPINION BY:
JANE A. RESTANI

OPINION:

FINAL ORDER

This matter was the original test case regarding interest on Harbor Maintenance Tax refunds. Before the court is plaintiff's motion of February 4, 2001 to lift stay and enter judgment.

After the court's original judgment in favor of plaintiff herein, the Court of Appeals reversed the part of the judgment finding interest owing under the applicable statute. See *IBM v. United States*, 201 F.3d 1367 (Fed.Cir. 2000), *rev'g* 22 C.I.T. 519 (Ct. Int'l Trade 1998), amended by Errata dated June 9, 2000 (partial reversal

substituted for remand). Plaintiff did not raise its constitutional arguments (which this court did not reach) in its response brief in the appeal. After mandate issued, plaintiff attempted to raise such issues here and defendant opposed the attempt. See Pl.'s Mem. Supp. Summ. J. at 3; Def.'s Resp. at 4-7; Pl.'s Reply at 12-16. The court stayed this case pending resolution of the constitutional issues in other cases. See Order dated June 4, 2001.

No party with a judgment for refund of Harbor Maintenance Taxes pursuant to 28 U.S.C. § 1581(i) jurisdiction, and whose interest award depended on a favorable resolution of this action, asked the court to amend such judgment to reference a different test case prior to partial reversal in this matter, even though constitutional issues had not been placed squarely before the appellate court. Thus, this remains the test case for all such judgments, and the court finds that this matter should be completed at the earliest time possible.

The Court of Appeals did not remand this matter for the court to consider constitutional issues after plaintiff's sought reconsideration in the appellate court on such grounds. The appellate court simply reversed the interest award aspect of the judgment. See *IBM*, 201 F.3d at 1374-75 (subsequent errata amending conclusion to reverse "the portion of the judgment of the Court of International Trade ordering interest pursuant to 28 U.S.C. § 2411

as owing on the principal amount adjudged."). Therefore, the court will not consider plaintiff's March, 2001 motion for summary judgment further. If the appellate court intended this court to consider the issue, the court would deny any award of interest for the reasons stated in Swisher Int'l, Inc. v. United States, 2001 Ct. Intl. Trade LEXIS, (2001).

If the Court of Appeals reverses Swisher or any other HMT interest case addressing constitutional claims, it is up to it to recall the mandate in this matter, if possible. This court may not amend the judgment of the appellate court.

Accordingly, plaintiff's motion of February 4, 2002, to lift stay and enter judgment is granted in part, plaintiff's motion for summary judgment for award of interest is denied and this matter is terminated.

INTERNATIONAL BUSINESS MACHINES CORPORATION v. UNITED STATES

00-482

SUPREME COURT OF THE UNITED STATES

531 U.S. 1183; 121 S. Ct. 1167; 148 L. Ed. 2d 1025

February 20, 2001, Decided

PRIOR HISTORY:
IBM v. United States, 201 F.3d 1367, 2000 U.S. App. LEXIS 681 (Fed. Cir. 2000)

JUDGES:
Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION:

Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied. Justice Stevens took no part in the consideration or decision of this petition.

INTERNATIONAL BUSINESS MACHINES CORPORATION, Plaintiff-Appellee,

v.

UNITED STATES, Defendant-Appellant.

98-1590

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2000 U.S. App. LEXIS 15299

May 31, 2000, Decided

NOTICE:
DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY:
Original Opinion of January 19, 2000. *IBM v. United States*, 201 F.3d 1367, 2000 U.S. App. LEXIS 681 (Fed. Cir., 2000)

OPINION:

ORDER

A combined petition for panel rehearing and rehearing en banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT,[1] and the petition for rehearing been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

1/ Two amici curiae briefs and the Appellant's supplemental response were also filed.

The mandate of the court will issue on June 7, 2000.

INTERNATIONAL
BUSINESS MACHINES
CORPORATION,
Plaintiff-Appellee,
v.
UNITED STATES,
Defendant-Appellant.

98-1590

UNITED STATES COURT
OF APPEALS FOR THE
FEDERAL CIRCUIT

201 F.3d 1367; 2000 U.S.
App. LEXIS 681; 2000-1 U.S.
Tax Cas. (CCH) P70,134; 85
A.F.T.R.2d (RIA) 518

January 19, 2000, Decided

PRIOR HISTORY:
Appealed from: U.S. Court of International Trade. Judge Jane A. Restani. *IBM v. United States*, 22 Ct. Int'l Trade 519, 1998 Ct. Intl. Trade LEXIS 73 (1998)

DISPOSITION:
REVERSED.

JUDGES:
Before PLAGER, CLEVENGER, and RADER, Circuit Judges.

OPINION:

PLAGER, Circuit Judge.

The United States ("the Government") appeals a judgment of the United States Court of International Trade, which awarded interest on refunds of the Harbor Maintenance Tax ("HMT"). The Supreme Court had earlier held that the HMT, as applied to exports, violates the Export Clause of the United States Constitution, and cannot be lawfully collected.[2] This case was filed to test whether the Government is obligated by law to pay interest on these refunds.

The Court of International Trade held that appellee may recover interest on refunds of HMT payments resulting from the Supreme Court's decision.[3] The trial court adjudged that 28 U.S.C. § 2411, which provides for post-payment interest on tax refunds, applies.[4] We conclude that neither § 2411 nor any other statutory

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2 *United States v. United States Shoe Corp.*, 523 U.S. 360, 118 S. Ct. 1290, 140 L. Ed. 2d 453 (1998).

3 *IBM v. United States*, 1998 Ct. Intl. Trade LEXIS 73, No. 94-10-00625, 1998 WL 325156 (Ct. Int'l Trade June 17, 1998).

4 All references to the United States Code are to the 1994 edition unless otherwise indicated.

provision provides the necessary authorization for an award of interest to appellee on its HMT refunds. The judgment of the trial court is reversed.

BACKGROUND

The HMT, enacted by Congress as part of the Water Resources Development Act of 1986, 26 U.S.C. § 4461-62 (1994), is an ad valorem tax imposed on shipments of commercial cargo which pass through the country's ports. Several thousand exporters challenged the constitutionality of the HMT as applied to exporters. In a test case, a three-judge panel of the Court of International Trade held that the HMT violates the Export Clause of the United States Constitution. See *United States Shoe Corp. v. United States*, 19 C.I.T. 1284, 907 F. Supp. 408 (1995). This decision was affirmed by a five-judge panel of this court, see *United States Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997), which decision was affirmed by the Supreme Court, see *United States v. United States Shoe Corp.*, 523 U.S. 360, 118 S. Ct. 1290, 140 L. Ed. 2d 453 (1998).

In the course of the initial litigation before the Court of International Trade, that court issued an Order declaring that the plaintiff was entitled to a refund "together with interest and costs as provided by law." *United States Shoe Corp. v. United States*, 19 C.I.T. 1413, 924 F. Supp. 1191, 1191 (Ct. Int'l Trade 1995). Subsequently the

court determined that the question of interest on the refund judgment "is not a matter without controversy and it cannot be resolved as a simple clerical matter." *U.S. Shoe*, 20 Ct. Int'l Trade 206, 207 (1996). The Court of International Trade called for briefing on the issue of whether the exporters may recover interest. However, before the court issued its decision on the question of plaintiff's entitlement to interest, the Government filed a notice of appeal from the court's earlier decision on the constitutional issue. Thus, the interest issue was not addressed during the appellate proceedings that followed.

While the appeal of the constitutional issue was proceeding, the Court of International Trade decided the question of whether the exporters were entitled to interest on their refunds. The court acknowledged that the United States is immune from paying interest absent express congressional consent, citing *Library of Congress v. Shaw*, 478 U.S. 310, 314, 92 L. Ed. 2d 250, 106 S. Ct. 2957 (1986). See U.S. Shoe, 20 Ct. Int'l Trade at 207. The court found the necessary express authorization with regard to HMT refunds in 28 U.S.C. § 2411, which provides that "in any judgment of any court rendered (... against the United States ...) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under [26 U.S.C. § 6621] upon the amount of the overpayment ...." *U.S. Shoe*, 20 Ct. Int'l Trade at 207-08.

After the Supreme Court affirmed the unconstitutionality of the HMT as applied to exports, the Court of International Trade designated this case as a companion test case to U.S. Shoe to give the Government the opportunity to appeal the award of interest. See *IBM*, 1998 WL 325156, at *1. The Court of International Trade deemed filed in this case the briefs concerning the issue of interest filed in the U.S. Shoe proceedings as well as its 1996 U.S. Shoe opinion awarding interest. See id. This appeal followed.

DISCUSSION

The issue of whether Congress has expressly authorized interest on HMT refunds is one of statutory interpretation, a question of law that we review independently and without deference to the trial court. See *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995) (questions of law subject to full and independent review). The oft-repeated general principle is that the United States is immune to claims for interest unless Congress has waived immunity by expressly consenting to an award of interest. See *Shaw*, 478 U.S. at 314. Congressional consent must be unambiguous. See *id.* at 318.

The HMT statutory provisions are relatively brief, and are codified in two sections, numbered 4461 and 4462, as "Subchapter A--Harbor Maintenance Tax" in Chapter 36-Certain Other

Excise Taxes, as part of Title 26-Internal Revenue Code. Section 4461 imposes the tax, and section 4462 provides definitions and special rules. Nothing in Subchapter A expressly addresses the question of whether in a refund of taxes paid thereunder, the payor is entitled to interest on the refund. The only provisions of Subchapter A that bear on the question are found in two paragraphs in subsection 4462(f), entitled "Extension of provisions of law applicable to customs duty."

Paragraph (1) of subsection (f) states: "Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter ...." Paragraph (3) states: "The tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." (Subtitle F of Title 26 deals with the procedure and administration of the internal revenue system.)

It appears abundantly clear from these provisions that, even though the HMT is codified as an excise tax and is part of the Internal Revenue Code ("IRC"), Congress intended the administration and enforcement of the tax to be treated as if the tax was a customs duty, and not a tax under the IRC.

Because the statutory provisions which established the HMT do not explicitly authorize interest payments on refunds of the tax, if Congress authorized such payments the authorizing statute must be found elsewhere. And if such a statute is found, we must determine whether Congress by the provisions of subsection (f) quoted above has precluded its application to an HMT refund. We have been urged to look at several possible sources for the authorization; we shall examine each in turn.

1. Subtitle F of Title 26, the Internal Revenue Code, in § 6611(a), states that "interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621." This provision of the Code cannot apply because the HMT statute, § 4462(f)(3), specifically exempts the HMT from all provisions in subtitle F of Title 26: "the [HMT tax] shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." Thus, any Congressional authorization of interest payments on HMT refunds must be found outside of subtitle F.

The Court of International Trade found the necessary express authorization for interest payments in another Title of the United States Code, namely Title 28, which is entitled "Judiciary and Judicial Procedure." 28 U.S.C. § 2411 provides, in relevant part, that "in any

judgment of any court rendered (... against the United States ...) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under [26 U.S.C. § 6621] upon the amount of the overpayment ...."

In its analysis of § 2411, the Court of International Trade first determined that the HMT is an internal revenue tax within the meaning of § 2411. See *U.S. Shoe*, 20 Ct. Int'l Trade at 208. The court then considered whether the two paragraphs of the HMT statute quoted above precluded application of § 2411 to HMT refunds. The court concluded that the HMT refund process would not constitute either "administration" or "enforcement" of the HMT, and that the HMT statute did not exempt HMT refunds from application of § 2411. See *U.S. Shoe*, 20 Ct. Int'l Trade at 208-09.

For purposes of analysis, we accept the argument of appellee and the holding of the Court of International Trade that payment of the HMT by exporters is an "internal revenue tax" within the meaning of § 2411. Because Congress codified the HMT as part of Title 26 of the United States Code, entitled "Internal Revenue Code," we may reasonably conclude that Congress considered the HMT to be an internal revenue tax. Furthermore, while it may be true that the constitutionality of the HMT was challenged because the HMT taxed goods exported out of the United States, the HMT is

clearly derived from internal sources--the U.S. exporter--rather than external sources--the foreign recipient; HMT revenues were collected in the United States from domestic companies based on their use of ports and harbors in this country. Thus both the structure and the content of the HMT point toward it being an internal revenue tax, and thus entitled on refund to the interest award provided under § 2411.

Furthermore, we accept appellee's contention that the language of § 2411 is broad enough, and has been so construed, as to cover the case before us. The question, then, is whether the express provisions of the HMT statute preclude application of § 2411 to refunds of the tax. As previously noted, the HMT statute in subsection (f) of § 4462 directs that "the [HMT] shall not be treated as a tax for purposes of subtitle F *or any other provision of law relating to the administration and enforcement of internal revenue taxes*." 26 U.S.C. § 4462(f)(3) (emphasis added). If the refund process for the unconstitutionally-levied HMT is not related to the "administration and enforcement" of an internal revenue tax, then § 2411 of Title 28 would appear to be ample authorization for interest to be paid on the refund. If, however, the refund process for this internal revenue tax relates to its administration and enforcement, the plain language of the HMT statute would bar the use of § 2411 as a statutory basis for an award of interest on HMT refunds.

This is a question of statutory interpretation. We begin with the language of the statute itself. If that language is clear and unambiguous, then it controls, and we need not--indeed we may not--go further. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240, (1989)); *Muwwakkil v. Office of Personnel Management*, 18 F.3d 921, 924 (Fed. Cir. 1994) ("When statutory interpretation is at issue, the plain and unambiguous meaning of a statute prevails."). To determine whether the statutory language is plain and unambiguous, we look at "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341.

Because the HMT statute does not define "administration and enforcement," we assume that the terms have their ordinary meaning, for which we may consult a dictionary. See *Best Power Tech. Sales Corp. v. Austin*, 984 F.2d 1172, 1177 (Fed. Cir. 1993) ("It is a basic principle of statutory interpretation ... that undefined terms in a statute are deemed to have their ordinarily understood meaning. For that

meaning, we look to the dictionary.") (citations omitted). Black's Law Dictionary defines "administer" as "to manage or conduct." Black's Law Dictionary 44 (6th ed. 1990). "Enforce" is defined as "to put into execution; to cause to take effect; to make effective; as, to enforce a particular law, a writ, a judgment, or the collection of a debt or fine; to compel obedience to." Id. at 528.

Applying these definitions to the HMT statute, we read "administration and enforcement of internal revenue taxes" broadly to encompass not only management of the tax system, including the assessment and collection of tax payments and issuance of refunds and interest on those refunds by the agency responsible, but also enforcement of the tax laws, including the obtaining and enforcement of judgments against both taxpayers and the United States. Nothing in the language of the statute limits "administration and enforcement" to the narrow interpretation applied by the Court of International Trade, i.e., "matters of routine administration and enforcement by an agency." *U.S. Shoe*, 20 Ct. Int'l Trade at 208.

Examination of the phrase "administration and enforcement" in the context of 26 U.S.C. § 4462(f)(3) supports this broader interpretation. Again, that paragraph of the statute exempts the HMT from "subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." Subtitle

F of the Internal Revenue Code is entitled "Procedure and Administration." In addition to chapters addressing agency responsibilities such as "Assessment" (chapter 63), "Collection" (chapter 64), and "Abatements, credits, and refunds" (chapter 65), subtitle F includes a chapter on "Judicial proceedings" (chapter 76). That chapter includes provisions regarding civil actions by the United States (subchapter A), proceedings by taxpayers and third parties (subchapter B), the Tax Court (subchapter C), and court review of Tax Court decisions (subchapter D).

A fair reading of the phrase "subtitle F or any other provision of law" as used by Congress in the HMT statute would thus include both the administrative and judicial processes as activities that relate to the "administration and enforcement" of taxes. Furthermore, interest on a tax refund would seem to be expressly included in those activities, since subtitle F itself contains a provision for interest on tax refunds, 26 U.S.C. § 6611(a). Accordingly, we are forced to conclude that Congress intended the phrase "administration and enforcement" to encompass not only agency action, but also judicial enforcement of the tax laws, including a judicial award of interest on tax refunds.

This interpretation is consistent with the other paragraph of subsection (f) of the HMT statute, § 4462(f)(1), quoted above, which provides that "all administrative and

enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] as if such tax were a customs duty." The Tariff Act of 1930, codified in the United States Code in Chapter 4 of Title 19, entitled "Customs Duties," provides for the administration and enforcement of customs duties in Subtitle III, entitled "Administrative Provisions." As discussed below, that subtitle includes a provision for interest on refunds of customs duties. See 19 U.S.C. § 1505.

Section 4462(f)(3) is complementary to § 4462(f)(1), i.e., the administration and enforcement provisions relating to tax laws cannot apply to the HMT, see § 4462(f)(3), because the administration and enforcement provisions of the customs laws do apply to the HMT, see § 4462(f)(1). Accordingly, because an interest provision such as 19 U.S.C. § 1505(c) is an administrative and enforcement provision of the customs laws, the section of Title 28, § 2411, which provides for interest on tax refunds, is a "provision of law relating to the administration and enforcement of internal revenue taxes" within the meaning of 26 U.S.C. § 4462(f)(3) and cannot apply to the HMT.

Although it is unnecessary to consider the legislative history because the statutory language is clear from the language itself and its context, we note that the legislative history does not contradict the plain meaning of the HMT statute. The Senate Finance Committee report, cited by the Court of International Trade, states

that it is more appropriate for the Customs Service, rather than the Internal Revenue Service, to collect and administer the HMT because the Customs Service has a strong presence at ports of entry and experience at appraising merchandise. See S. Rep. No. 99-228, reprinted in 1986 U.S.C.C.A.N. 6705, 6714. In order to facilitate the administration of the HMT by Customs, the report explains, the statute provides that all administrative and enforcement provisions of the customs law and regulations apply to the HMT as if it were a customs duty. See id. at 6714-15.

Though nothing in the legislative history defines the phrase "administration and enforcement," and the report is silent on the issue of whether a provision for interest on refunds relates to administration and enforcement, the legislative history confirms that § 4462(f)(3) was enacted as a counterpart to § 4462(f)(1) so that the administrative and enforcement provisions of only the customs statutes, and not the tax laws, would apply to the HMT. See id. at 6715. As noted above, the administrative provisions of the customs laws include interest provisions. Because Congress did not specifically exclude interest provisions from "administrative and enforcement provisions" with respect to § 4462(f)(1), we must conclude that the interest provisions of the customs laws, and not the tax laws, apply to the HMT.

2. Having concluded that the HMT is to be treated as a customs duty for administrative and enforcement purposes, we look to the customs statutes for an express authorization of interest. Two provisions, 28 U.S.C. § 2644 and 19 U.S.C. § 1505(c), were raised before the Court of International Trade and by amici on appeal. We agree with the Court of International Trade that these customs provisions do not provide for interest on HMT refunds on the facts of this case. See *U.S. Shoe*, 20 Ct. Int'l Trade at 208-09.

28 U.S.C. § 2644 permits a judicial award of interest upon a judgment in a civil action brought pursuant to 19 U.S.C. § 1515 to contest the denial of an administrative protest. Appellee, however, did not pursue a refund of HMT payments through a customs protest. Indeed, in the earlier test case, the Court of International Trade had jurisdiction over the constitutional challenge to the HMT under 28 U.S.C. § 1581(i), the residual jurisdiction provision, and not under 28 U.S.C. § 1581(a), the provision that gives the Court of International Trade jurisdiction over actions filed under 19 U.S.C. § 1515. See *U.S. Shoe*, 523 U.S. at 366. Because appellee did not file an administrative protest and did not contest the denial of such a protest, appellee is not entitled to interest under 28 U.S.C. § 2644.

The customs laws also provide for pre-judgment interest on certain excess duties paid to Customs. Specifically, "interest on excess moneys deposited shall accrue ... from the date

the *importer of record* deposits estimated duties, fees and interest ... to the date of *liquidation or reliquidation* of the applicable *entry* or reconciliation." 19 U.S.C. § 1505(c) (emphasis added); see also 19 U.S.C. § 1520(d) (1988) (repealed 1993) (authorizing interest "if a determination is made to reliquidate an entry"). On its face, the statute contemplates an entirely different factual scenario from the one before us. However, amici suggest that by substituting the exporter for the "importer of record," the HMT quarterly report for the "entry," and Customs' acceptance of the HMT payment for "liquidation," we can apply § 1505(c) to provide interest on HMT refunds. We are without power to rewrite a Congressional enactment to make it fit a case for which it was clearly not intended, no matter how compelling the case, particularly in light of the Supreme Court's mandate that Congress must expressly consent to an award of interest. See *Shaw*, 478 U.S. at 314. Accordingly, § 1505(c) does not authorize interest on HMT refunds.

In sum, we are bound by the rule that the United States is liable for interest only if Congress has waived sovereign immunity by expressly consenting to an award of interest. Section 4462(f) provides that the HMT is to be treated as a customs duty, and not as a tax, for purposes of statutory provisions relating to administration and enforcement. Because § 2411, the provision on which appellee and the

trial court relied, is a provision of law relating to the administration and enforcement of taxes, the HMT statute precludes the application of § 2411 to provide interest on refunds of the HMT. Furthermore, the statutory provisions of the customs laws dealing with interest on refunds do not entitle this appellee, on these facts, to interest on HMT refunds.

Congress has waived sovereign immunity in both the tax code and the customs laws to permit interest to be paid on certain refunds to allow for the time value of money when the Government has had the use for a period of time of money to which it is not lawfully entitled. Congress has considered this to be only fair and proper. In the case before us, appellee makes a case for equal treatment. After thorough consideration, however, we are unable to find in the existing statutory framework, nor has any been cited to us, the necessary Congressional purpose to provide for interest on these particular refunds under the HMT. If relief for these taxpayers is to be granted, Congress must grant it.

CONCLUSION

The judgment of the Court of International Trade must be, and is,

REVERSED.

INTERNATIONAL
BUSINESS MACHINES
CORP.,
Plaintiff,
v.
THE UNITED STATES,
Defendant,

Court No. 94-10-00625

UNITED STATES COURT
OF INTERNATIONAL
TRADE

22 C.I.T. 519; 1998 Ct.
Intl. Trade LEXIS 73; SLIP
OP. 98-78

June 17, 1998, Dated

JUDGE:
Jane A. Restani, Judge.

JUDGMENT:

WHEREAS the parties consent to entry of judgment with interest in this case for the purpose of permitting the Government an

opportunity to appeal the award of interest, it is hereby:

1. ORDERED that all briefs on the issue of interest and the opinion relating to the same, 1996 Ct. Intl. Trade LEXIS 45, Slip Op. 96-032, filed in United States v. United States Shoe Co., Court No. 94-11-00668 be deemed filed herein.

2. ORDERED that a money judgment is awarded to plaintiff in the amount of $ 330,689.00, to be paid by the defendant to the plaintiff within 90 days of the date of this Judgment; and

3. ORDERED that interest pursuant to 28 U.S.C. § 2411 is owing on the aforesaid principal amount. The payment obligation as to interest is stayed until the time for appeal expires or the appeal is finally resolved.

Jane A. Restani

Judge of the United States Court of International Trade

Relevant Constitutional, Statutory, and Regulatory Provisions

U.S. CONST. art. I, § 9, cl. 5

> No Tax or Duty shall be laid on articles exported from any State.

U.S. CONST. amend. 5

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

19 U.S.C. 1505(b)

> Collection or refund of duties, fees, and interest due upon liquidation or reliquidation. The Customs Service shall . . . refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation.

19 U.S.C. 1505(c)

> Interest. Interest on excess moneys deposited shall accrue . . . from the date the importer of record deposits estimated dues, fees, and interest . . . to the date of liquidation or reliquidation of the applicable entry or reconciliation.

26 U.S.C. 4462(f)(1)

> Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and

regulations shall apply in respect of the [HMT] (and in respect of persons liable therefor) as if such tax were a customs duty.

26 U.S.C. 4462(f)(3)

The tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes.

28 U.S.C. 1581

(a) The Court of International Trade Shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

* * *

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

28 U.S.C. 2411

In any judgment of any court rendered . . . for any overpayment in respect of any internal-revenue tax, interest shall be allowed.